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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 541

FLORIDA EAST COAST RAILWAY COMPANY,

Appellant,

v.

UNITED STATES of AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

MOTION TO AFFIRM

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October, 1965

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Atlantic Coast Line Railroad Company, intervenor-appellee, pursuant to Paragraph 1(c) of Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed.

This is a direct appeal from a final judgment entered May 19, 1965, by a District Court of three judges specially constituted pursuant to 28 U.S.C., Sections 1336, 1398, 2284 and

2321-2325, inclusive, dismissing an action brought by Florida East Coast Railway in the District Court of the United States for the Middle District of Florida, to enjoin, annul and set aside the enforcement of the order of the Interstate Commerce Commission, dated December 18, 1964, issued in ICC Finance Docket No. 22696, *Atlantic Coast Line Railroad Company, Et Al. Construction*, reported at 324 I.C.C. 286 (1964). The decision of the three-Judge Court was *per curiam*, reported as *Florida East Coast Railway Company* v. *United States*, 242 F.Supp. 490 (1965).

In support of its motion to affirm, Appellee Coast Line adopts as grounds for its motion those advanced in the motion filed, or to be filed, by the Interstate Commerce Commission, and in addition, it urges the grounds hereinafter set forth.

QUESTION PRESENTED

The only question presented by the appeal, as set forth in the Jurisdictional Statement, is as follows:

> May the Commission, under section 1(18) of the Interstate Commerce Act, authorize a railroad to construct an extended line of railroad to meet the desires of a single shipper when the public will be permitted to use the new line only with the consent of that shipper?[1/]

STATEMENT

Coast Line, on July 10, 1963, filed application with the Interstate Commerce Commission pursuant to Section 1(18) of

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1/Two additional questions were stated in the Notice of Appeal, but abandoned by appellant in the Jurisdictional Statement. Only the one question above stated is before the Court.

the Interstate Commerce Act,[2/] an application for a certificate of public convenience and necessity to construct a branch line of railroad in Palm Beach County, Florida, to serve the vegetable and sugar interest developing in a new territory several miles south of Belle Glade, Florida. The Florida East Coast, after refusing for years to meet the needs of the shippers in this new territory, filed on Septembr 13, 1963, its application for authority to construct a line of railroad to serve the same general area.

The full administrative process was employed by the Interstate Commerce Commission, including oral argument, and the Commission found that the evidence required that a certificate of public convenience and necessity be issued to Coast Line and denied Florida East Coast.

In considering the alleged invasion of territory argument, the Commission found that the "new vegetable producing territory" in the area of the proposed construction was not the "exclusive preserve" of Florida East Coast; that the Commission had not previously designated this area as Florida East Coast territory; and that a carrier "does not have the right to exclusively occupy a territory."[3/] In weighing the evidence, the Commission found that shippers had not been successful in getting Florida East Coast to offer this new territory rail service, and that it "stood unmoved by the beckoning of the new territory and the importunities of the shippers" until after Coast Line sought to build a track into this new territory.[4/] The Commission noted how Florida East Coast had vacillated -- first acknowledging the need for rail service to this

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2/49 U.S.C. §1(18).

3/*Atlantic Coast Line Railroad Company, Et Al. Construction*, 324 I.C.C. 286, 290 (1964).

4/*Id.* p. 290.

new territory, then on exceptions expressing skepticism as to public need for rail service -- but later at oral argument positively acknowledging that this territory required rail service -- but only by Florida East Coast.[5/]

In further weighing the evidence, the Commission found Florida East Coast had not made meaningful studies of the specific terrain; that it had made no provisions for right of way; and that it had made no provisions for bridging waterways, highways and canal embankments, as well as contemplated use of a private rail spur to reach the beginning point of its proposed construction.[6/] The Commission also found the record showed that the financial capacity of Florida East Coast "is sorely lacking", and that the expenditure proposed "is substantially in excess of the amount authorized for the project by East Coast's board of directors.[7/]

The Commission further found that the evidence showed "the effects of Coast Line's construction upon East Coast's revenues will not be such as to impair East Coast's operations and service,"[8/] and that there was no substance to Florida East Coast's contention that Coast Line's construction would unduly disturb the competitive situation in the affected area.[9/] The weight of the evidence was summed up very appropriately in a special concurring opinion by one Commissioner:

5/*Atlantic Coast Line Railroad Company, Et Al. Construction*, 324 I.C.C. 286, 291 (1964). In the Reply Brief filed by Florida East Coast before the three-Judge Court, it reverted to the argument that the record demonstrates no public need for rail service in this territory.

6/*Id.* p. 292.

7/*Id.* p. 292-293, 295.

8/*Id.* p. 294.

9/*Id.* p. 295.

> "In the circumstances, considering the demonstrated needs of the shippers and Coast Line's ability based upon careful planning to meet these needs expeditiously, the *weight* of the evidence leads me to agree with the result favored by the majority . . . . I regret that there seems to be no feasible alternative in the public interest." (Emphasis supplied)[10/]

The Commission further held the evidence showed "East Coast manifested no interest whatsoever in constructing an extension south of Belle Glade until after the application of Coast Line was filed"; that East Coast "ignored the solicitations" of shippers to extend its line; that Coast Line's extension "is considerably shorter and less expensive to construct"; and that the evidence Coast Line presented at the hearing is "complete and cover[s] every detail relating to traffic, engineering, operation, and cost and its [Coast Line's] construction could be commenced immediately upon issuance of the certificate . . . sought." This, the Commission said, would enable "Coast Line to place its extension in operation at the earliest possible date in accordance with the desires of the shippers to be served."[11/]

10/*Atlantic Coast Line Railroad Company, Et Al. Construction*, 324 I.C.C. 286, 297 (1964).

11/*Id.* p. 307. The record shows the principal shippers' (Duda) facilities were destroyed by fire, and following the Commission's report granting Coast Line the certificate, Duda commenced construction of a new packinghouse facility at a site to be served by the Coast Line's extension. Florida East Coast proposed to serve Duda at a different site approximately four miles away. Duda's new near $2 million facility is scheduled to be in operation when the next vegetable season opens in November 1965, and Coast Line's track is scheduled to be in place and ready to serve this industry by the opening date. Construction by Coast Line of the extension commenced on May 20, 1965, the day after the certificate became effective following dissolution by the three-Judge Court of its preliminary injunction.

The Commission also disposed of the one question raised on this appeal, namely, the "private line" argument, and held that if, in fact, this were a "private line", the Commission probably would have no jurisdiction over the matter at all,[12/] since Section 1(22) of the Act exempts such construction from Commission jurisdiction.[13/]

Following extensive briefs and oral argument before the three-Judge Court, the Commission's decision was affirmed by a *per curiam* opinion.[14/] The three-Judge Court, too, found the "private line" theory to be "without merit."[15/] After examining all arguments raised by Florida East Coast, the Court found: "We can reach no conclusion other than that the finding [public convenience and necessity] is supported by substantial evidence and the Commission's decision must be upheld."[16/]

12/*Atlantic Coast Line Railroad Company, Et Al. Construction*, 324 I.C.C. 286, 291-292 (1964).

13/49 U.S.C. §1(22). *"Construction, etc., of spurs, switches, etc., within State.* The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."
See *United States v. Idaho*, 298 U.S. 105, 80 L.ed. 1070 (1936), where this court held that a nine mile railroad track built to serve a single industry was a "spur track" over which the Interstate Commerce Commission lacked jurisdiction.

14/*Florida East Coast Railway Company v. United States*, 242 F.Supp. 490 (1965).

15/*Id.* pp. 490, 492.

16/*Ibid.*

ARGUMENT

The question presented to this Court, as stated by appellant, is whether the Commission, under Section 1(18) of the Interstate Commerce Act may authorize a railroad to construct an extended line to meet the desires of a single shipper when the public will be permitted to use the new line only with the consent of that shipper.

Both the Commission and the District Court considered this contention by appellant and found it to be without merit. They were both plainly right for several reaesons. The Commission said:

> "We do not agree with East Coast that the new line proposed by Coast Line would be a mere 'private line'. Duda is a corporation and Gressinger is a partnership. They conduct separate businesses and the fact that Gressinger may become a tenant of Duda at the latter's packing facilities does not in itself reduce it to the status of a subsidiary or affiliate of Duda . . . If the extension were, in fact, merely a 'private line', we would probably have no jurisdiction over the matter at all, since section 1(22) of the act exempts from our authority the construction of industrial lines located entirely within one State. There has been no contention that our jurisdiction herein is lacking on any ground."[17/]
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> • • • • • • •
>
> "East Coast expresses concern at the prospect this truck-delivered traffic [vegetables] being diverted to Coast Line (and in this, it is not consistent with its contention that the Coast Line construction involves only a 'private line' not open to public use)."[18/]

17/*Atlantic Coast Line Railroad Company, Et Al. Construction*, 324 I.C.C. 286, 291-292 (1964).

18/*Id.* p. 294.

The District Court also found the "private line" theory to be "without merit", and said:

> "The Commission considered the 'private line' contention of the FEC and rejected it. This Court has also given consideration to the question and finds it to be without merit. It is true that the greater part of shipments over the northerly leg of the ACL extension will, at the outset, originate with Duda and consist of vegetables produced by it or by the members of the Duda Cooperative. But Gressinger & Sons, who will either use the Duda facility or erect one of its own, are substantial producers and will become substantial shippers on the ACL extension."[19/]

The record before the Commission clearly establishes that the Coast Line extension will not serve only Duda (Tr. 146-147). The testimony shows that Gressinger & Sons will use the new Duda packinghouse facilities, or Gressinger will construct its own packinghouse on the Duda property (Tr. 147, 190).[20/] Additionally, Duda is a marketing cooperative and

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19/*Florida East Coast Railroad Company v. United States*, 242 F. Supp. 490, 492 (1965).

20/Witness Colbert, testifying on behalf of Duda, was asked the following question:

> "Q. Have any arrangements or agreements been made looking toward the use of your facilities by anyone *not directly connected* with your company?
>
> A. Yes. We have been in contact with Mr. James Gressinger with the idea of making this proposed railroad available to him, either through the use of our facility or making land adjacent available to him in the event he wants to build his own. *In fact, we are making land available to anyone who needs it.*" (Emphasis supplied) (Tr. 147)

Mr. Gressinger testifying on behalf of the partnership said:

> " . . . plans are being made right now as to whether we can construct our own building or let Duda process our material [vegetables] for us" (Tr. 190).

its members will obviously have full advantage of the new packinghouse facility (Tr. 132-133). The record before the Commission also shows that Duda and Gressinger will ship more than 3,100 carloads of vegetables by the end of the fifth operating season, and they will receive inbound shipments of crate material, insecticides and fertilizer totaling more than 600 cars annually (Exhibit No. 2). These statistics alone negate the "private line" theory. The outbound shipments of vegetables go to destinations all over the country for the general public to consume as food. The inbound shipments of crate material, insecticides and fertilizers are produced by manufacturing companies in no way connected with Duda and Gressinger. Therefore, numerous suppliers of these materials will benefit from the line serving Duda and Gressinger. It is quite apparent then that the so-called "private line" theory advanced by appellant is "without merit".

Besides the fact that the evidence of record clearly refutes the appellant's "private line" argument, such argument also lacks a legal position. If, in fact, Coast Line's extension were a line to serve Duda and only Duda, it would be, as the Commission suggested, an industrial line exempt from Commission jurisdiction under Section 1(22) of the Interstate Commerce Act.[21/]

The Commission frequently authorizes a railroad to construct an extension to serve a *single* shipper. For example, the Commission, in *Louisville & N.R.Co. Construction, Fatty to Calhoun, Tenn.*, 312 I.C.C. 169 (1960), authorized a 9.1 mile extension of line to serve the Bowater Southern Paper Company; in *Chicago & N.W.Ry. Construction*, 312 I.C.C. 639 (1961), a 1.91 mile construction was authorized to serve Muir-

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21/49 U.S.C. §1(22). See footnote 13, *supra*.

son Label Company; in *Georgia R. Construction and Operation*, 320 I.C.C. 25 (1963), 10.2 miles of line were authorized to serve the Georgia Power Company; and in *Chicago, B. & Q. R. Co. Construction*, 282 I.C.C. 539 (1952), the Commission authorized construction of 2.77 miles of line to serve Electric Energy, Inc.[22/] In *Chicago, Rock Island & Pacific Railroad Company* v. *United States*, 205 F.Supp. 378, 382 (N.D. Ill. 1962), the District Court clearly stated that the public may be seen through a single shipper. It said:

> "When the statute refers to public convenience and necessity, it does not mean any one person that may be benefited at a particular locality, but it means the public generally, *even though that public may be seen only through a single person*, ..." (Emphasis supplied)

Duda is the "single shipper" appellant refers to in the question presented on appeal, and appellant insists that without Duda's consent no one else, including Gressinger, can use the new extension. This argument has no foundation whatsoever. Exhibit 1 in the case is a map which shows the location of the line and the property owners involved. This map also is appended to Coast Line's briefs before the Commission and the District Court. A casual glance at this map shows that except for the last few hundred yards, the new rail line does not even touch the Duda property. (See also Tr. 158, 170). Duda has absolutely no control over the property contiguous to the Coast Line's extension and Duda could not restrict the use of

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22/In *Atlantic Coast Line R. R. Co., et al. Construction*, Finance Docket No. 15335 (1947) (not reported), Coast Line, over Florida East Coast's opposition, obtained a certificate of public convenience and necessity to construct about 16 miles of track to serve the Okeelanta Sugar Mill, which is the point where the line involved in this case originates. No claim was made then (1947) by Florida East Coast that Coast Line was building a "private line" to serve the Okeelanta Sugar Mill.

this line if it wanted to. There is testimony of record by the adjacent property owner (Serralles) that land will be made available to shippers desiring to build facilities on the proposed line (Tr. 177, 184-185). To the extent Coast Line did not already have right of way for its extension, the Serralles interest, not Duda, provided the easements (Exhibits 12, 13, 14 and 15), and the Commission noted there was no corporate relationship between Duda and Serralles.[23/]

The Commission and the District Court, therefore, correctly disposed of appellant's "private line" argument as one "without merit."

CONCLUSION

It is plain that the question presented by this appeal has no factual or legal basis. First of all, the evidence conclusively shows that the line under construction by Coast Line will not and can not be restricted to the use of a single shipper, but assuming *arguendo* the line is for Duda only, it still is not a private line because Duda ships and receives thousands of cars of freight annually which benefit the public generally. Assuming even further *arguendo* that the public generally will not use the line under construction, then the construction becomes exempt from Commission jurisdiction pursuant to Section 1(22) of the Interstate Commerce Act. Finally, the Coast Line extension and the right of way for such extension is completely independent of the Duda interest, and Duda thereby has no control, direct or indirect, of the use of this line by others.

23/*Atlantic Coast Line Railroad Company, Et Al. Construction*, 324 I.C.C. 286, 291 (1964).

It is respectfully submitted, therefore, that appellant presents no substantial question for the decision of this Court, and the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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